UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTEENTH REGION

ENAMELED STEEL AND SIGN CO., INC.
Employer

Case 13-RD-2410

and

METAL PROCESSORS UNION
LOCAL NO. 1, AFL-CIO
Union

and

JOHN SCARPINITI
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on February 17, 2004 before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine whether there exists a contract bar or a resolution of meritous Section 8(a)(5) unfair labor practice charges that requires dismissal of the instant Petition.[1]

I. Issues

Metal Processors Union, Local No. 1, AFL-CIO (hereafter the "Union") argues that the instant Petition is subject to dismissal on two grounds. First, the Union asserts that an unsigned memorandum of agreement entered into with Enameled Steel and Sign Co., Inc., (hereafter the "Employer") and/or a subsequently signed collective bargaining agreement act as

[1] Upon the entire record in this proceeding, the undersigned finds:
a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
c. The labor organization involved claims to represent certain employees of the Employer.
d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

contract bars to the petition. Alternatively, the Union argues that the Employer's settlement agreement to remedy Section 8(a)(5) unilateral changes requires that the petition be dismissed under the *Douglas-Randall* line of cases. John Scarpiniti (hereafter the "Petitioner") and the Employer each take the position that the petition is not subject to dismissal.

II. Decision

For the reasons discussed in detail below, I find that there is no bar to the processing of the instant petition and dismissal of the instant Petition is not warranted. Based on this finding,

IT IS HEREBY ORDERED that an election in the bargaining unit described below be conducted under the direction of the undersigned at a time and place to be set forth in a subsequently issued notice of election:

All full time and part time production employees employed by the Employer at its facility now located at 4568 West Addison Street, Chicago Illinois; but excluding the office and plant clerical employees, maintenance employees, technical employees, and professional employees, guards, and supervisors as defined in the National Labor Relations Act.[2]

III. Statement of Facts

The Employer and the Union were parties to a collective bargaining agreement that was effective by its terms from September 15, 1999 through September 14, 2002. That agreement expired with no new agreement having been reached. On October 2, 2002, the instant petition was filed, but its processing was blocked by a pending unfair labor practice charge[3]. On July 31, 2003, a complaint issued in Case 13-CA-41053-1[4], alleging that the Employer on May 13, 2003, had unilaterally changed terms and conditions of employment by requiring the Union to give advanced notice before visiting the Employer's facility and by forbidding the Union to meet with employees at their workstations during working time.

Apparently, the Employer and the Union continued negotiations toward a new agreement, and the record contains an unsigned memorandum of agreement dated September 19, 2003, which appears to extend the terms of the expired contract from its expiration date to September 14, 2005 with a few modifications to the original terms listed therein[5]. On October 14, 2003, the Region approved a unilateral settlement agreement of the complaint allegations in

[2] The Petition includes maintenance employees in the unit description. The record demonstrated that previously maintenance employees were included in the unit. Since the filing of the Petition, the maintenance employees are no longer represented by the Union, and the parties stipulated on the record to exclude them from the unit description.

[3] Case 13-CA-40494-1 was filed on September 16, 2002 and was dismissed on May 6, 2003.

[4] At the hearing the Union requested that administrative notice be taken of Case 13-CA-41053-1.

[5] A Union representative testified that this memorandum of agreement was signed by the Employer sometime in November, 2003, but that he did not have a copy of the signed agreement at the hearing.

Case 13-CA-41053-1, pursuant to which the Employer agreed to restore the alleged unilateral changes to the *status quo* that existed prior to the changes and to post an appropriate notice to employees. On January 16, 2004, the Region closed Case 13-CA-41053-1 upon an administrative determination of satisfactory compliance with the settlement agreement. On January 23, 2004, the Employer signed a new collective bargaining agreement with the Union effective from September 15, 2002 through September 14, 2005.[6]

IV. Analysis

At the hearing, the Union asserted that the memorandum of agreement dated September 19, 2003, and the subsequent agreement signed in January, 2004, should bar the processing of the instant petition because " it was only by virtue to the Company's refusal to bargain that [the agreement reached in January, 2004] was not reached prior to the filing of this petition".

Under current Board law, only unfair labor practices that occurred prior to the filing of a decertification petition upon which the employer enters into an agreement requiring the Employer to recognize and bargain with the union require the dismissal of a decertification petition or other petition challenging the status of the union, and any subsequent collective bargaining agreement reached by the parties will constitute a further bar to any challenges to the unions majority status during the term of that agreement pursuant to the Board's normal contract bar rules. This policy was set forth by the Board in *Douglas-Randall*, 320 NLRB 431 at 435 (1995):

> [A]n Employer's agreement to settle outstanding unfair labor practice charges and complaints by recognizing and bargaining with the union will require final dismissal, without provision for reinstatement of a decertification petion or other petition challenging the union's majority status ***filed subsequent*** to the onset of the alleged unlawful conduct. When the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, that contract will, of course, serve as a further bar to the petition under the Board's normal contract bar rules (emphasis added).

The record contains no support for the Union's contention. There is no evidence of any Employer unfair labor practices which precluded the Union and the Employer from reaching a collective bargaining agreement prior to the expiration of the collective bargaining agreement on September 14, 2002. There is also no record evidence of any Employer unfair labor practices prior to the filing of the instant petition on which a bargain obligation was incurred by the Employer. Indeed, the unfair labor practice charge that was pending at the time the petition was filed was found to lack merit and dismissed. The only evidence of any unfair labor practices

[6] The Union signed the agreement on January 2, 2004.

where the Employer entered into a settlement agreement occurred in May, 2003 and post date the filing of the instant petition by seven months. In short there is no basis for finding that the Employer and Union were precluded by any unfair labor practices from reaching an agreement that would have barred the processing of the instant petition or that the filing of the instant petition was the result of employee dissatisfaction caused by Employer unfair labor practices – critical underpinnings for the application of the Board's policy in *Douglas-Randall,* supra. Thus, I find no basis for dismissing the instant petition based on *Douglas-Randall,* or barring the processing of the instant petition based on the Board's contract bar policy as the agreements asserted by the Union to constitute bars were executed by the parties long after the instant petition was filed, and they were not the result of any bargaining obligation arising out of a settlement of unfair labor practice that occurred prior to the filing of the instant petition. See also, *Supershuttle of Orange County, Inc*., 330 NLRB 1016, 1017-18.

Furthermore, while the agreements asserted by the Union to constitue bars have retro-active application to September 15, 2002, which precedes the filing filing of the instant petition, the Board has long held that for contract bar purposes it is the date of execution that is applicable, not the retro-active application date. *Hotel Employers Assn. of San Francisco,* 159 NLRB 143 (1966). Inasmuch as either of the possible agreements asserted by the Union to be bars were executed, if at all, long after the filing of the instant petition they can not constitute bars.

Finally, as Case 13-CA-41053-1 has been closed upon the Region's administrative determination of satisfactory compliance with the terms of the settlement agreement, there is no impediment to direct an election herein and allowing the employees in the above described unit to exercise their Section 7 rights to choose whether they wish to continue to be represented by the Union for purposes of collective bargaining.

V. Conclusion

The instant Petition was timely filed, there is no basis for dismissing the petition under *Douglas-Randall,* supra., and it is not subject to a contract bar. Accordingly, I have directed an election herein.

VI. Direction of Election

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(*s*) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(*s*) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also

eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by the Metal Processors Union Local No. 1, AFL-CIO.

VII. Notices of Election

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VIII. List of Voters

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, Suite 800, 200 West Adams Street, Chicago, Illinois 60606 on or before **March 12, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for

review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

IX. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by **March 19, 2004**.

DATED at Chicago, Illinois this 5th day of March 2004.

/s/ Gail R. Moran
Gail R. Moran, Acting Regional Director
National Labor Relations Board
Region Thirteen
200 West Adams Street, Suite 800
Chicago, Illinois 60606

CATS – Bars to Election (31)

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